

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 18, 2006

STATE OF TENNESSEE v. DENISE DYCUS

Appeal from the Circuit Court for Montgomery County
Nos. 23891, 024064 John H. Gasaway, III, Judge

No. M2005-02252-CCA-R3-CD - Filed May 25, 2006

This is an appeal from the order of the trial court revoking the Defendant's probation and ordering her to serve the remainder of her ten-year sentence with the Department of Correction. The Defendant, Denise Dycus,¹ raises as her sole issue on appeal the claim that the trial court abused its discretion in revoking her probation and ordering her to serve the remainder of this sentence in confinement. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JOHN EVERETT WILLIAMS, JJ., joined.

Robert T. Bateman, Clarksville, Tennessee, for the appellant, Denise E. Dycus.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; John Carney, District Attorney General; and Arthur Bieber, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

In January of 1987, a Montgomery County grand jury indicted the Defendant on one count of failure to return rental property. See Tenn. Code Ann. § 39-3-1118 (1987). In March of 1987, a Montgomery County grand jury indicted the Defendant on six counts of felony worthless checks. See Tenn. Code Ann. § 39-3-301 (1987). On October 1, 1987, the Defendant entered guilty pleas to all seven charges under both indictments and was sentenced to four years for the failure to return rental property conviction and six years for the bad check convictions. The trial court ordered the

¹The record also refers to the Defendant as "Denise Dycus Landrum" and "Denise Landrum."

sentences to be served consecutively in part but granted immediate probation. Accordingly, the Defendant received an effective ten-year sentence to be served on probation.

Several years into her probation the Defendant began to accumulate multiple probation violations. In April of 1991, a probation violation warrant was filed alleging the Defendant failed to make her court ordered restitution payments and failed to complete her community service requirements. In April of 1993, the Defendant waived a hearing on additional charges of violating her probation and was placed in Community Corrections. In November of 1993, an amended probation order was issued because the Defendant tested positive for marijuana, and she was ordered to serve ten days in jail. In January of 1996, a probation violation warrant was issued against the Defendant for committing the offense of theft, and on March 18, 1996, an order of revocation of probation was issued mandating the Defendant serve the remainder of her sentence in confinement. However, a few days later on March 26, 1996, the revocation order was rescinded, and the Defendant was again reinstated into the Community Corrections program.

The Defendant was subsequently transferred to probation, and in March of 1997, another probation violation warrant was issued against the Defendant, this time for failing to report to her probation officer and for committing the new offenses of writing bad checks and possession of drug paraphernalia. A second warrant was issued in October of 1997 for absconding. While awaiting a hearing on these prior probation violations, the Defendant was again arrested for possession of drug paraphernalia in December of 1997 and failed to report this fact to her probation officer. A third warrant was issued in January of 1998 charging the Defendant with violating her probation for failure to report the December 1997 arrest.² The Defendant was once again arrested for possession of drug paraphernalia in February of 1998, and that same month a fourth warrant was issued charging the Defendant with violating the terms of her probation for 1) failing to abide by the laws of the United States; 2) failing to report her arrest; 3) failure to report to her probation officer; and 4) missing curfew on two occasions. It is the charges contained in this most recent probation violation warrant that are the subject of this appeal.

Although this warrant was issued in February of 1998, it was not served until seven years later when the Defendant was found in Florida and extradited back to Tennessee.³ The Defendant was given a probation revocation hearing in August of 2005. At this hearing, the Defendant's probation officer, Mr. Gary Hammer, testified that the Defendant did not report her arrest on possession of drug paraphernalia, had failed to report to him at all since her last probation revocation hearing, and violated curfew. On cross-examination, Mr. Hammer admitted that the Defendant had a favorable report from Community Corrections when she was transferred to him for probation.

²The record reveals only that this "VOP [was] settled."

³While the Defendant does not raise issue with the delay between the issuance of the warrant and its execution, we note that a probation revocation warrant, when issued within the term of the probation, tolls the limitation of time in which a court may act to revoke probation. See Alder v. State, 108 S.W.3d 263, 267 (Tenn. Crim. App. 2002).

The Defendant testified at the probation revocation hearing that in the past, she had a drug problem, but in early 1998, she admitted herself to the Buffalo Valley drug rehabilitation program, which she successfully completed in February of 1998.⁴ Shortly thereafter she moved to Knoxville and stayed at a half-way house for several months before earning sufficient wages to obtain her own housing. The Defendant stated that she worked for Cracker Barrel restaurants, first at a Knoxville location, then was transferred to Pigeon Forge, and in 2002, was transferred to a Cracker Barrel in Florida.

The Defendant further testified that she had not been on drugs since 1998. On cross-examination, she admitted that there was a period of time during which she failed to report to her probation officer because she “was on drugs so bad, and [she] just didn’t know what else to do.” At the completion of the probation revocation hearing, the trial court stated for the record that the Defendant “[b]y her own testimony . . . left without permission, and stayed gone, and didn’t report, and continued to use drugs.” The court further noted that the Defendant had “served confinement time, significant time. It’s not as if she doesn’t know what’s expected of her. She just won’t comply.” The Court found the Defendant in violation of the terms of her probation, revoked probation, and ordered the Defendant to serve the remainder of her original sentence in confinement.⁵ This appeal followed.

ANALYSIS

On appeal, the Defendant asserts that the trial court abused its discretion by ordering her to serve the remainder of her original ten-year sentence in confinement rather than allowing her to remain on probation. To support this claim, the Defendant argues that the trial court failed to recognize and factor into its decision the Defendant’s successful completion of a drug rehabilitation program; completion of the half-way house program; the fact that she obtained and maintained steady employment from 1998 until her arrest; and that she has managed to stay drug-free since 1998. The Defendant also argues that the trial court erred in concluding that the Defendant “continued to use drugs.” These errors, the Defendant asserts, reveal that the trial court “failed to exercise a conscientious and intelligent judgment in revoking the Defendant’s probation.”

A trial judge is vested with the discretionary authority to revoke probation if a preponderance of the evidence establishes that a defendant violated the conditions of his or her probation. See Tenn. Code Ann. §§ 40-35-310, -311(e); State v. Shaffer, 45 S.W.3d 553, 554 (Tenn. 2001). “The proof of a probation violation need not be established beyond a reasonable doubt, but it is sufficient if it allows the trial judge to make a conscientious and intelligent judgment.” State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991).

⁴The record does not reveal where the Defendant received her drug treatment. Buffalo Valley, Inc. currently operates a drug rehabilitation program near Hohenwald, TN.

⁵The record indicates that the Defendant received 1,628 days credit towards her ten-year sentence as of the date of her probation revocation, August 25, 2005. The Defendant does not challenge in this appeal the amount of time remaining to be served.

When a probation revocation is challenged, the appellate courts have a limited scope of review. This Court will not overturn a trial court's revocation of a defendant's probation absent an abuse of discretion. See Shaffer, 45 S.W.3d at 554. For an appellate court to be warranted in finding that a trial judge abused his or her discretion by revoking probation, "there must be no substantial evidence to support the conclusion of the trial court that a violation of the conditions of probation has occurred." Id. Proof of a probation violation is sufficient if it allows the trial court to make a "conscientious and intelligent judgment." State v. Anthony, 109 S.W.3d 377, 380 (Tenn. Crim. App. 2001).

The evidence contained in the record supports the trial court's findings that the Defendant violated the conditions of her probation and further supports the trial court's conclusion that probation should be revoked. We conclude that the testimony presented at the probation revocation hearing justified a finding by a preponderance of the evidence that the Defendant violated the terms of her probation. The probation violation warrant charged the Defendant with four violations. The trial court properly discounted the first, as no evidence was presented that the Defendant failed to abide by the laws of the United States upon arrest for possession of drug paraphernalia. However, the trial court did not abuse its discretion in accrediting the testimony of the Defendant's probation officer, who stated that the Defendant failed to report her arrest, failed to report to him from 1998 until she was apprehended in 2005, and failed to meet her curfew requirements.

Additionally, we note that the Defendant herself admitted at the probation revocation hearing that she (1) used illegal drugs while on probation (adding that she admitted herself to a drug treatment program and has been drug-free since 1998); (2) failed to report to her probation officer (due in part to her drug use); and (3) moved to Knoxville and then eventually to Florida without permission. Under these circumstances, we cannot conclude that the record is void of substantial evidence that would support a trial court's finding that a probation violation had occurred.

Furthermore, we find that the trial court did not abuse its discretion in electing to fully revoke the Defendant's probation and order incarceration because of her multiple probation violations. Contrary to the Defendant's assertion in her appellate brief, the trial court did take into account the fact that she successfully completed a drug rehabilitation program and has stayed off drugs since that time. The trial court noted that "[the Defendant's] been to rehab with the Court's approval" as part of its findings of fact. Additionally, we conclude that the trial court accurately found the Defendant "continued to use drugs," considering the Defendant was sentenced to ten days confinement in 1993 for testing positive for marijuana and then admitted at the probation revocation hearing that she again used drugs while on probation up through 1998.

The record also reveals that the Defendant was fully informed of the requirements of her various probation and community correction sentences and the consequences of failing to meet these requirements. The Defendant had been through several probation revocation proceedings and given more than one "second" chance at serving her time under a suspended sentence. Despite repeated attempts by the trial court to rehabilitate the Defendant through supervised probation and community corrections programs, the Defendant has consistently failed to meet the requirements of alternative

sentencing. Accordingly, we conclude that the trial court neither erred nor abused its discretion in revoking the Defendant's probation and ordering the remainder of her sentence be served in confinement. This issue is without merit.

CONCLUSION

Based on the foregoing reasoning and authorities, the judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE